FILE COPY

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

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THE DUNHOOD-HARDIN PRINTING COMPANY, CHICAGO

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The petitioner respectfully moves for leave to file the Petition for Rehearing which was three (3) hours out-of-time and has been lodged in the Clerk's office since 3:00 a.m. (E.S.T.), December 30, 1972, pending decision on this motion.

I.

The order denying certiorari was entered on December 4, 1972[1] and under *Rule 58(2)*, a petition for rehearing was due on December 29, 1972. Forty (40) printed copies of the petition together with the printer's proof of service were delivered by the undersigned to United Air Lines,

1. At page 1 of the petition for rehearing the date of the order appears as December 4, 1971. This is a typographical error.

O'Hare Terminal Building, Chicago, Illinois and should have been delivered, via Flight No. 278 and United's flight crew and livery service, to the Court Building before 11:00 p.m. (E.S.T.), on the due date. Flight 278 is a scheduled flight from Chicago (O'Hare) to Washington, D. C. (National). It departs Chicago at 7:30 p.m. (C.S.T.) and arrives in Washington at 10 p.m. (E.S.T.). [U. A. L. Schedules (eff. 12/14/72) p. 20.] On December 29, 1972, weather, atmospheric and other flight conditions delayed the flight and it arrived at Dulles International Airport at 1:00 a.m. (E.S.T.), December 30. Flight 278 was used because it was recommended by air line officials.

The nature of the case and the matters presented by the petition are such that preparation was inhibited by caution. Certiorari procedures do not readily lend themselves to proving that a record is neither cloudy nor opaque. The analysis-by-juxtaposition [Pet. for Rehrg., 7-11] is the product of trial and error. In short, the undersigned candidly admits that he could not prepare the rehearing papers, such as they are, in less time than was taken. In all events, we disclaim dilatory neglect as a cause for delay.

II.

Rule 58(2) rests upon the principle that litigation must end. [*United States* v. *Ohio Power Co.*, 353 U. S. 93.] The facts and circumstances of the case have no relevant impact on the reason for the rule. Delay is not a factor and the petition for rehearing was physically present in the Clerk's office the same as if it had been received between 5:05 p.m. and 11:55 p.m. (E.S.T.) on December 29, 1972.

On the other hand, the request for reconsideration rests on claims which support independent actions under 28

U. S. C. § 1651(a)[2] and *Rule 60(b)(3), Federal Rules of Civil Procedure.*[3]

Moreover, in present posture, the case appears to support a new and independent claim under 42 U. S. C. §§ 1983, 1985 and 28 U. S. C. §§ 1331(a), 1343(1), (2), (3) and (4). [See *e.g.*: *Monroe* v. *Pape,* 365 U. S. 167; *Adickes* v. *Kress & Co.,* 398 U. S. 144; *Bivens* v. *Six Unknown Federal Agents,* 403 U. S. 388; *Griffin* v. *Breckenridge,* 403 U. S. 88.] It has long been the rule that there is actionable fraud "where by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case." [*United States* v. *Throckmorton,* 98 U. S. 61.] And just last term, the Court declared that "the right of access to the courts is indeed but one aspect of the right of petition" and concluded that once it is established that there has been abuse of the judicial process that has "produced an illegal result, viz, effectively barring (litigants) from access to the agencies and courts" then "actions of that kind cannot acquire immunity . . ." [*California Transport* v. *Trucking Unlimited,* 404 U. S. 508 (30 L. Ed. 2d at 648).]

III.

The opinion of the court of appeals principally decides that "the conduct for which (petitioner) was removed from office may be established by (respondents) from the use of

2. § 1651. *Writs.*

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

3. (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

his testimony before a Grand Jury compelled by a grant of full transactional immunity.'"[4] [Pet. App., 4-5.] There is no specification of the conduct constituting the appearance of impropriety.

Two questions are presented by the petition for certiorari [pp. 2-3]. They are:

1.

> Does Petitioner's removal, as a Circuit Judge of Cook County, Illinois, because he refused to waive his right against self-incrimination, when called to testify before a Grand Jury investigating his personal behavior, violate his rights under the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments?

2.

> Where the punishment is a penalty prescribed for criminal conviction, and 'appearance of impropriety' constitutes the standard applied to criminally innocent personal conduct and to the refusal to waive the constitutional right against self-incrimination before a grand jury: Is the proceeding and the forfeiture of Petitioner's State judicial office repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

If the petitioner had waived his right against self-incrimination and testified he would have been indicted. Had that been the case the standard for removing him from office would have been criminal conviction as prescribed by section 4 of Article IV of the Illinois Constitution. [See:

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4. The statement "use of his testimony . . . compelled by . . . transactional immunity" signals *real* versus the *unreal* but intended meaning. The nature of the immunity forcing the testimony is irrelevant to evidentiary use to prove the fact of the matters stated therein. But the use of testimony "compelled by . . . *full transactional immunity*" [emphasis added] is relevant to establish that petitioner would have been indicted but for his refusal to waive his federal right against self-incrimination.

People ex rel. Keenan v. *McGuane*, 13 Ill. 2d 520, 537, 150 N. E. 2d 168.] And in those circumstances, his acquittal when the indictments were held not to state the crime charged, would have precluded the forfeiture of his office.

But the petitioner was merely named as a non-indicted co-conspirator because he was compelled to testify under Illinois, full transactional immunity statute.

Thus, whatever the case concerning the use of the compelled testimony and whatever the cause it implies are really irrelevant. The critical and the decisive fact remains —the petitioner was removed from office simply "because he refused to waive his right against self-incrimination when called to testify before a Grand Jury investigating his personal behavior." [Questions Presented, No. 1, Pet. for Cert. 2]

As is shown on pages 7-11 of the petition for rehearing; this is the case and neither judicial omission nor adversary misstatement can change it!

The overbroad statement of issue by the Seventh Circuit is, hence narrowed, to whether petitioner's claim against self-incrimination was conduct constituting the appearance of impropriety because the use of his testimony, in tandem with the Illinois immunity statute, established that he would have been indicted had he agreed to incriminate himself.

The respondents did not file a brief in opposition and on September 19, 1972, the Clerk of this Court addressed a letter to them and stated: "The Court has directed that a response be filed in this case." [Copy of letter appended hereto.]

The respondents then misrepresented that the documentary exhibits had been considered as evidence of their content and rested upon the irrelevant and immaterial assertion that "Neither the Fifth nor the Fourteenth

Amendment prohibits the use of testimony given pursuant to a grant of full transactional immunity in a subsequent civil proceeding instituted to remove the immunized witness from office of state court judge." [Br. in Opp., 6.]

IV.

From out here, the fact that the Court requested a response has meaning! The Court's certiorari jurisdiction is completely discretionary. "Writs of certiorari are matters of grace". [*Wade* v. *Mayo*, 334 U. S. 672, 680]. And the denial thereof "simply means that fewer than four members of the Court deemed it desirable to review a decision of a lower court as a matter 'of sound judicial discretion'." [*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918.]

Patently, the opinion of the court of appeals is vaguely ambiguous. But so is the appearance of impropriety or criminality standard! If the transcript of testimony "compelled by a grant of full transactional immunity" was used, *as it was used*, to explain why the petitioner was merely a non-indicted conspirator, it established circumstances surrounding his claim against self-incrimination and thus conduct leading to the appearance of criminality. If, on the other hand, the transcript was used, *as it was NOT used*, as evidence proving the fact of the matters therein, it could be construed as establishing some unspecified conduct constituting impropriety.

The "request for a response" indicates, at least, that the case and the questions presented by the petition for certiorari deserved plenary consideration. The brief in opposition exploited the ambiguities below. It clearly appears that the order denying certiorari, therefore, rests upon extrinsic misrepresentation, whether it be: (1) That "a case may raise an important question but the record may be cloudy" [*Maryland* v. *Baltimore Radio Show*,

supra]; or (2) That "the Supreme Court would be likely not to reach the point of alleged importance or conflict." [Stern & Gressman, *Supreme Court Practice* (4th ed. 1969) p. 315].

Request for rehearing is primarily predicated on the claim that the court below "has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court[5] as to call for an exercise of this Court's power of supervision." [*Rule 19(b), Rules of the Supreme Court of the United States*]. Pages 7-11 of the petition for rehearing suggests that the overbroad ambiguities below may not be judicial oversight.

V.

It has been with all respect that we have proceeded in the State and Federal tribunals involved in this case. And it has been indeed humbling to know that those using the overbroad and duplicitous devices against us may have enjoyed our apparent naivete. We have not made vituperative counterattack or responded in kind. We have eschewed making charges concerning motive because the case and questions presented are of far reaching constitutional importance. Furthermore, we did not wish to make a hard case harder. Our system, we thought, is sufficiently self-executing that a present-day Emile Zola would have no contemporary standing or relevance.

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5. Typical of the effort to imply findings where there are none is the District Court's declaration that petitioner "is arguing that he has a federal right to remain as a judge regardless of his conduct" followed by "there is no constitutional right to public office (citation) and '(t)here is no devine right of judges to flout the law.' *Jenkins* v. *Oregon State Bar* . . ." [Pet. App. 12]. A finding or conclusion in an Oregon case is not fact here. Whatever may have been the "divine right" claim in the cited case is immaterial—this claim is that there is a constitutional right of judges to claim the right of a person to remain silent and not "flout the law".

Our singular aim has been and is an authoritative declaration on the two issues presented by the petition for certiorari. Petitioner's refusal to resign under the coercion and cajolery employed and the consequences of the "expurgatory ritual" have been wasted unless this controversy leads to candid adjudication that will preclude its repeat for another two hundred (200) years.

The case and the questions presented stand on their own merits. On the other hand, new litigation under the theories suggested *ante* 2 & 3, could only detract from the institutional integrity which has led to what Gerald Dickler has so aptly described as "the ritual . . . of expurgation—to rid the body politic of an irritant, an alien substance, or a poison."[6]

The petition for rehearing is out-of-time because of circumstance. The petitioner's problem also stems from fortuity. Unless this motion is allowed petitioner will remain the victim of a totality of circumstances that will do far more than destroy him. Our national commitment to "Equal Justice Under Law" is more than bill-board rhetoric heralding the annual approach of LAW DAY, U. S. A.

CONCLUSION.

For these reasons, the motion and the petition for rehearing should be allowed.

Respectfully submitted,

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

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6. Dickler, MAN ON TRIAL. Quote is from author's preface quoted at length at page 22 of the petition for certiorari.

APPENDIX.

September 19, 1972

The Honorable William J. Scott
Attorney General of Illinois
160 N. LaSalle Street
Chicago, Illinois

Re: Richard A. Napolitano v. Daniel P. Ward, Justice of the Illinois Supreme Court, et al., No. 71-1648

Dear Sir:

On June 19, 1972, John E. Cassidy, Jr., Esq., filed on behalf of Mr. Richard A. Napolitano a petition for a writ of certiorari in this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit (No. 71-1444), dated March 21, 1972. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Forty printed copies of the response, together with proof of service thereof, should reach this office on or before October 19, 1972.

Very truly yours,

MICHAEL RODAK, JR.,
Clerk.

cc: John E. Cassidy, Jr., Esq.
800 Lehmann Building
Peoria, Illinois 61602